United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original

74-2285

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel.
TOBIA SPINA,

Relator-Appellant,

-against-

ADAM McQUILLAN, Warden,

Respondent-Appellee.

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74-2885

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P/S

BRIEF FOR RESPONDENT-APPELLEE

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
Two World Trade Center
New York, New York 10047
Tel. (212)488-7657

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ARLENE R. SILVERMAN
Assistant Attorney General
of Counsel

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BRIEF FOR RESPONDENT-APPELLEE

Question Presented

Did an interval of twenty six months between indictment and trial deny appellant his constitutional right to a speedy trial where he himself sought further delay in the proceedings against him, where he never asserted the right prior to the eve of trial, and where he was not prejudiced by the delay which was caused, in part, by court congestion.

Statement

This is a appeal from an order of the United States District Court dated November 5, 1974 which denied petitioner's application for a federal writ of habeas corpus (Tenney, J.).

Prior History

In a two-count indictment filed November 19, 1969, Watkins Parry, a police lieutenant, and Tobia Spina, a police detective, were charged with conspiring to receive unlawful gratuities and receiving unlawful gratuities while employed as New York City police officers. Indictment No. 5677-69.

Following a jury trial, Parry and Spina were found guilty of both counts in the indictment, and were sentenced to concurrent terms of 3 months and one year.*

Appellant appealed the conviction to the Appellate Division, First Department claiming, inter alia, that the delay of over two years after indictment was a violation of his constitutional right to a speedy trial.** The Appellate Division affirmed. 41 A D 2d 602 (1973). On February 18, 1973, leave to Appeal to the New York Courts of Appeals was denied.

* Appellant was free on his own recognizance prior to trial and bailed pending appeal.

Facts

Prior to the commencement of appellant's trial on January 6, 1972, Harold Foner, Esq., made two applications to the trial court (A 38).* Counsel stated that Albert Seedman, Chief of Detectives, who he characterized as a material witness, was out of the country, and that if appellant went to trial at the present time, Chief Seedman would be unavilable as a witness (A 38-40).

Counsel also raised, for the first time, a speedy trial claim. He stated that his client was indicted on November 19, 1969, that he believed that the case was moved to trial during the month of December, 1969, that it was now the twenty fifth month from indictment, and that it was the People that did not move the case to trial. He stated that because of the two year delay, many witnesses were not available to the defense (A 40-41). He stated that at no time in two years did he request an adjournment (A 41) although he went on to admit that Mr. Legum, his co-counsel, requested a stay of the proceedings in December, 1971 so that both appellant and his co-defendant could go to the Appellate Division for a change of venue on the grounds of prejudicial publicity because of the Knapp Commission. Counsel for appellant instructed Mr. Legum to state that appellant joined in the application for a change of venue (A 42).

* References are to the appendix to appellant's Brief in the Appellate Division, First Department. A copy has been submitted to the Court.

Assistant District Attorney Michael Corriero stated that he was assigned to the case in September, 1971. He stated that the case arose during the time that Assistant District Attorney Phillips, who had previously handled the case, was on trial before Justice Murtagh on the Black Panther case (A 44). The notations on the case jacket of the District Attorney indicated that the case was before Justice Schweitzer in 1969 and that on November 28, 1969 it was adjourned without a date for defendants to make motions.

On January 23 it again appeared on the calendar. Assistant District Attorney Weinstein appeared for Mr. Phillips who was still on trial before Justice Murtagh. The case was adjourned to March 30th. On March 30th the case was adjourned to April 20th for motions. Mr. Corriero stated that it was adjourned on April 20th at the request of the People to answer defense motions.

On May 19, the case was again adjourned pending motions. On October 23, 1970, the matter was adjourned to January 12, 1971 for trial on consent of both sides. On January 12, the case was adjourned to March 15 for trial. Assistant District Attorney Weinstein was engaged and there was a notation on the jacket that the defense was not ready. On March 15, 1971, the case was adjourned to March 31 because

counsel for appellant's co-defendant was not present. The case appeared in Part 37 on September 24, 1971. Mr. Corriero stated that he appeared for the first time on the case. He had prepared the case and it was marked ready and passed on consent (A 44-46).

On November 15, he again answered the calendar call, ready, but there was no part available (A 47). On November 23, it was again marked ready and passed because there was no part available (A 47). At this point, defense counsel made a motion for a stay which was denied by Justice Murtagh. The case was then put on the calendar of Justice Lane; however, there was another case ahead of appellant's which lasted two weeks. The matter was adjourned again. (A 47).

Mr. Corriero stated that "the People were ready to proceed and the People have been ready to proceed to trial since at least September 24th, when I was assigned the case, and there has been no delay with respect to -- from September 24th." (A 47).

Mr. Foner stated that he never requested an adjournment except for the application for the stay in December, 1971 for the purpose of going to the Appellate Division. (A 50). The Court denied appellant's motion for a dismissal the indictment on the speedy trial claim and for an adjournment of the proceedings to obtain Chief Seedman's testimony.

Opinion Below

The District Court, pursuant to Barker v. Wingo, 407 U.S. 514 (1972), analyzed appellant's claim that he was denied his right to a speedy trial in light of the reasons for the delay, the prejudice to the defendant from the delay, and the assertion of the right by the defendant prior to trial.

The Court observed that appellant never asserted his right to a speedy trial until the trial was about to begin, that he suffered no prejudice to his case by the delay, that he himself sought further adjournment of the proceedings, and that he was free on his own recognizance during the entire period. The Court concluded that there was no infringement of his Sixth Amendment right.

ARGUMENT

THE DISTRICT COURT PROPERLY DENIED APPELLANT'S APPLICATION FOR HEARING SINCE THE STATE TRIAL COURT PROPERLY DENIED APPELLANT'S MOTION FOR A DISMISSAL OF THE INDICTMENT ON HIS SPEEDY TRIAL CLAIM.

Appellant argues that the District Court erred in failing to grant him a hearing on his claim that he was denied his constitutional right to a speedy trial where the state trial court had failed to hold a hearing on his claim. However, the state trial record conclusively established that appellant never seriously urged a speedy trial claim in the trial court, that counsel's motion for the first time to dismiss the indictment immediately prior to the commencement of appellant's trial was a mere formality, and that appellant's allegation of personal prejudice to him by the delay in his District Court petition, even if properly presented to the federal courts in the first instance, 28 U.S.C. § 2254(b) was nothing more than an attempt to tailor his case to recent Supreme Court decisions analyzing speedy trial claims. Barker v. Wingo, 407 U.S. 514 (1972).

Appellant was indicted in November 1971. His trial commenced in January 1973. Prior to the day of trial, appellant never asserted his right to a speedy trial. He never complained of the delay nor formally moved that the proceedings against him be commenced. Indeed, as late as December, 1973, he joined in his co-defendant's motion for a stay of the proceedings against him pending an application to the Appellate Division for a change of venue. Then, on the day of trial, appellant requested a further adjournment of the proceedings on the grounds that Albert Seedman, Chief of Detectives, was then unavailable to the defense, nothwithstanding that appellant ultimately failed to call Chief Seedman as a witness when he was indisputably amenable to process.* In light of these two applications, appellant's argument in the District Court that he was deprived of his right to a speedy trial must fall by the wayside.

This conclusion is bolstered by counsel's own phrasing of the belatedly raised speedy trial claim trial. Although he attempted to establish some prejudice to the defense by the delay

* Chief Seedman testified for appellant's co-defendant at trial.

before the trial court, stating that witnesses were no longer available to the defense (A 41), he simply referred to these witnesses in general terms, leaving the distinct impression that the claim was gratiutous and without any genuine basis in fact. Counsel utterly failed to particularize these "missing" witnesses in any way, and did not state what steps, if any, had been taken to locate them. Most significantly, counsel did not detail the circumstances leading to their alleged unavailability or the testimony they would allegedly offer if still available which would have some bearing on appellant's case. Indeed, notwithstanding appellant's attempt in this Court, for the first time, to identify these witnesses, (Appellant's Brief, footnote p. 4) he still fails to particularize their relevancy to his defense.*

> "[A]bsent a specific showing of prejudice to the defense a relatively long period of delay may be excused." Wallace v. Kern, ____ F. 2d ____ (2d Cir. July 8, 1974).

Appellant was free on his own recognizance during the pendency of the proceedings against him. He was not subjected to any oppressive pretrial incarceration nor inhibited from contacting his lawyer or witnesses and from preparing a defense. Although he alleges in his supplementary federal habeas corpus

* Since appellant never identified the alleged missing witnesses in the New York Courts nor particularized the circumstances of their alleged unavailability and the relevancy of their testimony, he has failed to exhaust his state remedies pursuant to 28 U.S.C. § 2254(b).

petition, for the first time, 28 U.S.C. 2254(b), that because of the delay, he suffered loss of gainful employment, was forced into debt his marriage dissolved and he suffered mental anguish and public scorn, such consequences frequently follow indictment itself and are not necessarily related to a delay in trial. Moreover, these recent allegations are rendered highly suspect by the fact that during the entire period between indictment and trial, appellant never once sought to have the proceedings commenced, but, contrariwise, twice sought further adjournments of his trial. As the Supreme Court in Barker pointed out "[t]he more serious the deprivation, the more likely a defendant is to complain...." We emphasize that failure to assert the right will make it difficult for a defendant to prove that he was denied a speedy trial." 407 U.S. at 531, 532.

Finally, it should be pointed out that the adjournments at issue were not deliberately designed to prejudice the appellant. The initial adjournments from November 1969 to October 1970 were attributable to defense motions. Subsequent adjournments were on consent or not objected to because the Assistant District Attorney assigned to the case was on trial before Justice Murtagh. On September 24, 1971, the case was adjourned on the consent of both sides. On November 15, 1971 there was no available part for trial and the case was carried

in a ready and passed status. Then in December, 1971, appellant himself sought a delay in the proceedings. This was thus not an instance of a delay due to purposeful or oppressive action on the part of the government. Barker v. Wingo, supra, 531; U.S. v. Stein, 456 F. 2d 844, 848 (2d Cir. 1972); U.S. v. Smalls, 438 F. 2d 711 (2d Cir. 1971).

In sum, appellant's speedy trial claim fails to establish a basis for a constitutional deprivation which required further hearing. The case against appellant was exceptionally strong and convincingly established that appellant and his co-defendant, two New York City Police officers, actively solicited a monetary payment from officials of Montgomery Ward for a period covering four weeks for having recovered two trucks of stolen Montgomery Ward merchandise. Apropos here, the evidence consisted in large part of incriminating tape recorded conversations which time could not dim between appellant and an employee of Montgomery Ward in which appellant discussed the amount of the monetary award and the form of payment.

In view of the overwhelming evidence, undoubtedly appellant was not anxious to go to trial hoping beyond hope for some turn in events to his benefit. Accordingly, even while making the speedy trial motion, counsel, on appellant's behalf, argued for a further delay.

The Supreme Court in Barker v. Wingo, supra, observed that claims of a denial of speedy trial must be determined on an ad hoc basis in light of the circumstances of each case. See e.g. Barker v. Wingo, supra, (five years between indictment and trial); U.S. v. Stein, supra (five years between indictment and trial, ten years between last transaction complained of and trial); U.S. v. Smalls, supra (five years between arrest and trial). In view of the circumstances at bar, appellant's motion to dismiss the indictment was a last ditch attempt to avoid the consequences of his wrongdoing, was never and could never have been seriously urged, and the trial court properly denied his application.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE AFFIRMED.

Dated: New York, New York
December 16, 1974

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

ARLENE R. SILVERMAN
Assistant Attorney General
of Counsel

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with P. A. Young